No. 11376

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as BARNES-WOODIN FUR DEPARTMENT,

Appellee,

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

PETITION FOR REHEARING

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The Honorable Judges of the United States Circuit Court of Appeals for the 9th Circuit, having on the 26th day of March, 1947, filed an opinion modifying and affirming the judgment and decree of the Court below, and the appellee desiring to Petition for Rehearing under Rule 25, does file the following as his Petition and Brief therein.

This Court found "The evidence shows that none of the destroyed articles was in a storage room when destroyed." This action by the court is contrary to the holdings of the Court in that the appellate court has interfered with the findings of the trial court, irrespective of the fact that there is no evidence preponderating against this finding and this court therefore merely substituted its opinion for that of the trial court. The insurance policy makes no designation or gives no definition of what is a "storage room" but uses the plural of the word "room," obviously indicating that the storage room was not to be limited to one specific place.

It is a well established principal of law that insurance contracts are to be considered liberally in insured's favor and strictly against insurer (appellee's Brief, page 21-24). With this as the theory of law we do not understand how this court can define the "storage rooms" as being limited to that upon the second floor only.

The place where 75% of the coats were destroyed was in a room which was used *for no other purpose than*

that of storing furs and though this room or space was not set apart by a door or partition it was clearly defined and separated by an L in the walls formed by the stairway, clearly cleaving the workroom from the mezzanine storage room so that as a matter of fact there was clearly evidence upon which the trial court could substantiate the finding that this was a room. The trial court heard testimony of all witnesses and the only witnesses who testified that this was not a storage room were the representatives of the insurance company who were obviously prejudiced in their opinions and we therefore respectfully submit that this court is in error in disturbing the findings of the trial court.

Irrespective of the court's determination of this finding of fact, the court has failed to make any finding relative to individual floater certificates (72, 74, 75, 94, 306, 398) which were issued by the appellee for and on behalf of the appellant as provided under a rider as evidenced by plaintiff's Exhibit 1 (44-45), for thirteen of the garments that were destroyed in this fire were covered under these floater policies for which the customers paid an additional premium. Each of the policy holders under these individual certificates made proof of claim upon the appellant, which proof of claim was admitted by appellant (25) to be proper and within time. All of these certificate holders were settled with by appellee from whom he took an assign-

ment of all their rights. These policy holders, the amount of their insurance and the reference page wherein this amount is shown is as follows:

Mrs. W. H. Bierman	$450.00	(72)	
Mr. Victor Belair	350.00	(73)	
Mrs. Gregory Bitter	400.00	(74)	
Irene Bryson	400.00	(76)	(113)
Mrs. George Fortier	225.00	(85)	(114)
Mrs. M. W. Jones	350.00	(92)	
Alice Mary Krause	150.00	(93)	
Mrs. E. E. Leach	250.00	(95)	
Elsie Logozzo	350.00	(95)	
Mrs. Carl Lowenthal	225.00	(96)	
Elaine McCorkindale	350.00	(97)	
Dorothea Stanley—2 coats 2 policies	800.00	(109)	

for a total of $4,300.00.

It was not necessary for the trial court to determine this question for the court's finding that there was sufficient insurance coverage eliminated a segregation of these individual floater policies. The trial court found (419) in finding No. 8, "That thirteen of the customers who suffered loss in said fire had their furs and garments trimmed with furs covered by certificate endorsements, being special certificate policies covering the amount beyond that as listed under the assured's legal liability. That said customers had paid an additional premium for said additional coverage and had filed with said company due proof of loss. That under a letter dated October 4, 1944, the law firm of Cheney & Hutcheson appearing for and on behalf

of the defendant herein, returned to said customers and policy holders their proof of loss with the notation that settlement would be completed with them." The company by these certificates insured the policy holders and not the appellee herein in the amount of the certificate at any place that said coats might be destroyed and had these said policy holders instituted individual suit for the recovery under said certificate policies they could have recovered each in their own individual amount and would not be under any limitation of any amount that the appellee had herein; and the appellee should therefore be entitled to recover this amount of $4,300.00, irrespective of the court's finding of a limitation of $10,000.00 under the terms and conditions of the policy with the appellant company, for the appellee acted as the agent of the appellant, under direct authority from them, for the issuance of these certificates and the fact that the appellee took assignment of these personal claims should not in any way limit the amount of recovery.

Even though this court should affirm the finding that the appellee is limited under the $10,000.00 provision of the policy it should allow an additional $4,300.00 to cover the individual insurance written to the policy holders and assigned to appellee.

Or in the event this court should be unable to deter-

mine this question it should be remanded to the trial court for further determination as to these policies.

We, therefore, respectfully submit that the opinion of the trial court is in error in finding that the articles destroyed were not in a storage room and that the court should grant a rehearing herein or affirm the decision of the trial court; and respectfully submit that should the first request be denied that there should be a rehearing upon the question of the allowance of the additional sum of $4,300.00 to compensate and reimburse the amounts paid to individual holders of certificates from appellant company upon which action was instituted under assignments.

Respectfully submitted,

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